



UNITED STATES
CIVILIAN BOARD OF CONTRACT APPEALS

January 3, 2008

CBCA 943-RELO

In the Matter of WILLIAM P. McBEE, JR., and JUDITH L. SAMMEL

William P. McBee, Jr., and Judith L. Sammel, APO Area Europe, Claimants.

Kimberly A. Schmitt, Deputy Chief, Global Human Resources and PCS Service Center, Central Security Service, National Security Agency, Fort George G. Meade, MD, appearing for Department of Defense.

DANIELS, Board Judge (Chairman).

William P. McBee, Jr., and Judith L. Sammel, National Security Agency (NSA) employees who are married to each other, were transferred by their agency to a permanent duty station in Europe. They requested to be paid a temporary quarters subsistence allowance (TQSA) for a period of fifty-five days. NSA paid them such an allowance for forty-five days, but refused to make payment for the additional ten days. We agree with the couple that NSA must extend their TQSA to cover the additional ten days.

Background

Mr. McBee and Ms. Sammel reported for duty in Europe on July 7, 2006. In sending the couple overseas, NSA assigned to them a "PCS [permanent change of station] sponsor" who advised that because housing in the area was "a real pain," they should expect to spend about sixty days in temporary quarters before finding a permanent residence. An NSA family liaison officer recommended staying temporarily in a certain apartment, which was listed on an NSA website, under a short-term lease. Following the advice of the PCS sponsor, the couple signed an eight-week lease for the apartment. They actually stayed there from July 7 until September 1, when they moved into permanent quarters.

Even before signing the lease, the couple had tried to determine from NSA personnel the agency's policy regarding the length of time during which TQSA would be paid. A "Summary of PCS Entitlements" given to Ms. Sammel on March 10, 2006, and dated February 28 of that year, stated, under the heading "Temporary Quarters Subsistence Allowance (TQSA)," "Overseas lodging/meals for up to the first 45 days at site, while you look for adequate housing." NSA acknowledges, however, that at a March 10 briefing, a desk officer explained orally that "[t]he standard Agency allowance is up to 45 days but can be extended for circumstances beyond the employee's control."

The couple has provided additional NSA documents which speak to the agency's policy regarding duration of TQSA.

-- A July 2003 housing directive from the NSA Europe office says:

Employees are limited in the amount of Temporary Quarters Subsistence Allowance (TQSA) they may receive -- 45 days with the possibility of up to 10 additional days in certain situations.

-- An NSA webpage on TQSA, dated July 12, 2007, says:

The 45 . . . -day[] temporary quarters subsistence period[] may be extended up to but not more than an additional 10 days . . . if it is determined by the head of agency that compelling reasons beyond the control of the employee require continued occupancy of temporary quarters.

-- An NSA document entitled "November 2000 - Policy Points," as updated through December 15, 2004, says:

What are the TQSA[] limits that went into effect 1 Oct 00? . . . Arrival at site: 45 days. . . . 10 day extension possible. . . . Extensions will only be granted if it is determined by the C/Global PCS Services that compelling reasons, beyond the control of the employee, require continued occupancy of temporary quarters.

-- A summer 2005 NSA publication entitled "Global HR Post-its" states:

Currently [material deleted] authorizes an initial 45 days of TQSA, NTE [not to exceed] 60 days. If permanent housing is NOT going to be ready/available by the 30th day of the initial TQSA period the employee may request thru local HR [human resources] to . . . [material deleted] Desk Officer an extension up

to 15 days with a valid justification. In the event there is an extreme housing issue with solid justification from the local housing officer [material deleted] Management will consider on a case by case basis.

-- An NSA table entitled “[Material deleted] Desk Officer and Management Approval Process,” dated March 1, 2006, shows an entry of “46-60 days” for TQSA on arrival under the heading “[material deleted] desk officer” and an entry of “61 to 120 days” for TQSA under the heading “[material deleted] policy.”

-- Finally, what the couple describes as “a template used by NSA/HR for processing TQSA extensions” states:

Justification for extensions 46-60 days come to [material deleted] Desk Officer[.] Extensions 61-120 days thru [material deleted] Desk Officer to [material deleted] Policy Officer require Housing or Site HR/Mgmt [human resources management] Justification and approval.

In addition to these documents, the couple states that when they arrived at their European post, they were told that a local policy limited TQSA eligibility to thirty days. In opposing the claim for days forty-six through fifty-five of TQSA, NSA makes reference to an electronic mail message which says that the agency paid the couple for the standard thirty days and also for an additional fifteen days.

NSA does not contest the couple’s explanation of their experience in locating permanent housing at the location to which they were sent. They were told to use the services of an NSA housing officer. Beginning on July 18, this individual showed them three houses, two of which had inadequate parking facilities and one of which was rented by someone else immediately after they saw it. On July 24, the couple began looking on their own. On about August 1, they found an appropriate apartment. An NSA human resources officer told them that they could not sign a lease until the housing officer had approved it. The housing officer initially refused to review the lease because he had not been involved in finding the apartment. Eventually, on August 10, he provided the necessary approval. The couple and the landlord then agreed on an occupancy date of September 1 to allow the landlord time to arrange for necessary carpet replacement and repainting. The couple’s household goods, which were being shipped to Europe by NSA, did not arrive in the country in which they were stationed until August 24.

Discussion

The Overseas Differentials and Allowances Act authorizes agencies to pay to employees who are stationed abroad but not provided Government quarters without charge “[a] temporary subsistence allowance for the reasonable cost of temporary quarters (including meals and laundry expenses) incurred by the employee and his family . . . for a period not in excess of 90 days after first arrival at a new post of assignment in a foreign area or a period ending with the occupation of residence quarters, whichever is shorter.” 5 U.S.C. § 5923(a)(1)(A) (2000). This period “may . . . be extended for not more than 60 additional days if the head of the agency concerned or his designee determines that there are compelling reasons beyond the control of the employee for the continued occupancy of temporary quarters.” *Id.* § 5923(b).

The authority to issue regulations implementing this Act has been delegated by the President to the Secretary of State. Exec. Order No. 10,903, § 2, *reprinted as amended in* 5 U.S.C. § 5921 app. at 1071-72. The Secretary of State has exercised this authority by promulgating sections 120 through 129 of the Department of State Standardized Regulations (DSSR), which label the allowance provided by statute as TQSA. The Department of Defense’s Joint Travel Regulations (JTR) expressly provide that that Department follows the TQSA rules established in the DSSR. JTR C1003. *See generally Richard H. Whittier*, GSBICA 16538-RELO, 05-1 BCA ¶ 32,926; *Samuel C. Stringer*, GSBICA 16369-RELO, 04-2 BCA ¶ 32,731; *Okyon Kim Ybarra*, GSBICA 15407-RELO, 01-1 BCA ¶ 31,334.

Sections 121 and 122.2 of the DSSR restate the time limitations for TQSA which are contained in statute. Section 122.3 states, “Instead of paying TQSA as provided herein, an agency or post may . . . limit the number of days TQSA may be paid to fewer than the maximum number of days.”

Evidently, NSA has attempted to take advantage of DSSR section 122.3 by limiting the number of days of an employee’s eligibility for TQSA. Whether the agency has an actual policy limiting the days is not at all clear, however, based on the evidence of record in this case. Going from most to least restrictive versions, the policy (if there is one) might be thirty days, with a possible extension of fifteen; forty-five days; forty-five days, with a possible extension of ten; forty-five days, with a possible extension of fifteen; forty-five days, with a possible extension of unspecified length; and forty-five days, with a possible extension of seventy-five.

We construe section 122.3 to permit an agency or post to limit the number of days of an employee’s eligibility for TQSA only if the agency or post has established the limitation through a clear policy which has been made available to employees before they enter into

arrangements for temporary quarters at a new duty station overseas. Any construction of the provision which would permit agencies and posts to limit the number of days on an employee-by-employee basis, without regard to prescribed standards, would be manifestly unfair. NSA has failed miserably at the task of establishing a limitation on the number of days of TQSA eligibility through a clear policy. The agency sent its employees Mr. McBee and Ms. Sammel to Europe with two different explanations of their potential TQSA benefits, gave them a third explanation after they arrived, and published in various documents other, entirely different explanations.

We conclude that neither NSA nor the post to which it assigned the couple had, as of the time the agency sent the couple to Europe, a policy limiting the number of days of an employee's eligibility for TQSA. Consequently, the agency must apply to the couple the limitations prescribed by statute and sections 121 and 122.2 of the DSSR: their period of eligibility was ninety days, with a possible extension of sixty. Because their claim is for a total of fifty-five days (the forty-five already paid, plus an additional ten), and fifty-five is less than the ninety days authorized, the claim is granted. NSA must pay Mr. McBee and Ms. Sammel for the additional ten days of TQSA at issue in this case.

Even if we were to find that NSA had the policy that the couple was orally told about prior to leaving their prior post -- eligibility for the first forty-five days at the foreign post, with a possible extension of unspecified length -- we would still grant this claim. The evidence shows that the couple followed the advice of their agency sponsor in renting temporary quarters for a period of eight weeks. The evidence also shows that the couple acted promptly and responsibly in finding permanent quarters. The agency, on the other hand, was dilatory. It told the couple to use the services of its housing officer in locating accommodations, but the housing officer showed them only unacceptable lodgings and then delayed ten days in approving a lease for an apartment the couple found by themselves. Additionally, the agency did not move the couple's household goods into the country until after the forty-fifth day of their assignment there, and it has not given us any reason to believe that the goods could have been delivered to the apartment earlier than they were actually delivered.

STEPHEN M. DANIELS
Board Judge